In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No.....

APPELLANT'S BRIEF

Upon appeal from the District Court of the United States, for the District of Idaho, Northern Division

ROBERTSON & PAINE,
402 Hyde Building,
Spokane, Washington.
Attorneys for Appellant.

Filed.....Clerk.

GREEN-BERRY-HUGHES PTG. CO., SPOKANE

In the United States

Circuit Court of Appeals

for the Ninth Circuit

GEORGE SHALLAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No.....

APPELLANT'S BRIEF

Upon appeal from the District Court of the United States, for the District of Idaho, Northern Division

---

ROBERTSON & PAINE,
402 Hyde Building,
Spokane, Washington.
Attorneys for Appellant.

STATEMENT OF THE CASE

The defendant Shallas was charged and convicted of the crime of perjury. The circumstances surrounding the alleged perjured testimony were as follows:

The defendant Shallas operated the Ethlyn Hotel in Spokane, Washington. November 28, 1928, he was called and testified as a witness for the defense in a criminal case in which one Theodore Sievers was being tried in the District Court of Idaho for a violation of the National Prohibition Act. Sievers was charged with possessing and selling moonshine whiskey at Tensed, Idaho, on or about October 14, 1928;—Tensed, Idaho, being about sixty miles from Spokane, Washington. The defendant Shallas testified in the Sievers case as follows:

"Q Where do you reside? A. Spokane.

"Q What is your business?

"A Hotel business.

"Q What hotel are you operating?

"A The Ethlyn Hotel.

"Q Were you operating the Ethlyn Hotel during the month of October, 1928? A. Yes.

"Q Were you at the hotel on the 13th, 14th and 15th days of October, 1928? A I was.

"Q Did you see Mr. and Mrs. Sievers there at your hotel on the thirteenth? A I did.

"Q Did you see them there on the 14th?

"A I did.

"Q And what part of the day do you recall seeing them on Sunday, the 14th?

"A About nine—between nine and ten o'clock they went out, and Mr. Sievers told me—

"Q That would be hearsay?

"A I seen them in the morning.

"Q And again in the afternoon? A Yes.

"Q How many times do you recall—approximately how many times do you recall?

"A A couple of times in the afternoon.

"Q Did they stay at the hotel Sunday night?

"A They did.

"Q Do you remember their checking out there Monday?

"A The fifteenth, yes.

"Q Who, if anybody, did the checking out —who did they pay there? A Personally to me.

"Q Mr. Sievers did? A. Yes.

"Q Calling your attention to October 14th, you say you saw the defendant Theodore Sievers at your hotel? A. Yes.

"Q About what time did you first see him there on that day?

"A I seen him in the morning once, around nine-thirty or ten.

"Q When did you next see him?

"A In the afternoon.

"Q What time?

"A A couple of times between three and five.

"Q You saw him twice between three and five?

"A Yes." (Tr. 4-5.)

This testimony the indictment alleged to be false in the following language:

> "Whereas, in truth and in fact, as he, the said George Shawle, alias George Shallas, then and there well knew, the said Theodore Seivers was not at the Ethlyn Hotel in the city of Spokane, State of Washington during the afternoon and evening of October 14, 1928, during the time or times that the said George Shawle, alias George Shallas testified that the said Theodore Seivers was there, or at any other time on that day and that the said George Shawle, alias George Shallas, did not see the said Theodore Seivers during the afternoon of October 14, 1928, in the Ethlyn Hotel or any other place in the city of Spokane, State of Washington, whereby he, the said George Shawle, alias George Shallas did, then and there, as aforesaid, knowingly, wilfully, unlawfully, corruptly, falsely and feloniously swear and did feloniously commit perjury."

The Government's case, in addition to the testimony relative to the fact that Shallas was duly sworn and had actually testified as alleged in the indictment, which is not disputed, consisted of the testimony of Sievers who testified that after his liquor trial, which resulted in a hung jury, he was arrested on a perjury charge. That charges were likewise placed against his wife and mother-in-law;

that he had pled guilty to both the liquor and perjury charges, but that the charges had not been pressed against his wife and mother-in-law.

He further testified that he was at the Ethlyn Hotel the night of October 13, 1928, but left the morning of October 14th, without seeing the defendant Shallas, and did not again return to the hotel on that date, but left Spokane around one o'clock (Tr. 29), and arrived in Tensed, Idaho, between 4:30 and 5:30 P. M. and sold the liquor to Suzanne Lawrence at Tensed, as charged in the information against him, in the early evening of October 14th. He stated further that after his arrest he went to Shallas and explained the situation to him and Shallas agreed to testify that he was in Spokane on October 13th, 14th and 15th, and that he, Shallas, made an alteration in his hotel register so that it would not appear that the room that Sievers occupied on October 13th had been re-rented to another party on the 14th, but would show it re-rented instead on October 15th.

Then several witnesses who lived in Tensed were called to testify that they saw Sievers in Tensed on October 14th, during the afternoon and evening. (Their testimony will be discussed more at length in the argument.) And the testimony of N. D. Wernette, the attorney who defended Sievers at his trial, that Sievers had brought him some sort of a receipt showing that he had paid his bill at the Ethlyn Hotel in October, but that he did not know where it was now.

The defendant moved for a directed verdict at the close of the Government's case. (Tr. 43).

The defendant testified in his own behalf and denied changing the register sheet or committing the perjury. Said he saw Sievers in the morning of October 14th at the Ethlyn Hotel and saw him again there in the afternoon, sometime after lunch, he couldn't say the exact hour, (Tr. 47), it might have been a little after three. (Tr. 48). And the testimony of Sievers' sister-in-law that she was with him until 1:30 or 1:45 P. M. on October 14th. (Tr. 45).

The defendant again moved for a directed verdict at the close of all the evidence, which was denied and exception allowed. (Tr. 69). A verdict of guilty was returned and sentence of $1,000 and eighteen months in McNeil's Island imposed. Motion for new trial was filed and argued and taken under advisement by Judge Cavanah, written briefs submitted, and the petition denied on July 11, 1929.

SPECIFICATIONS OF ERRORS.

I.

The court erred in denying the motion for a directed verdict at the close of the Government's case and at the close of all the testimony. (Assignments of Error 1 and 2).

II.

The Court erred in refusing to give defendant's requested instruction No. 2 as follows:

"You are instructed that the defendant is charged with falsely testifying in a criminal proceeding in this court in substance and effect that he saw one Theodore Sievers at the Ethlyn Hotel at Spokane, Washington, on the 14th day of October, 1928. The Government has alleged that such testimony was false and that the said George Shallas did not see the said Theodore Sievers in Spokane, Washington, during the afternoon and evening of October 14th, 1928, or at any other time on that date.

"I instruct you that the burden of proof is on the Government to prove the alleged false statement beyond a reasonable doubt. You cannot find the defendant guilty unless you believe beyond a reasonable doubt that the defendant, George Shallas, never saw the said Theodore Sievers in Spokane, Washington, on October 14, 1928."

and in instructing the jury as follows:

"You are instructed that to find the defendant guilty it is not necessary that you find he knowingly testified falsely in all the respects alleged, that is, either that Sievers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928."

and in re-instructing them as follows:

"I think I said to you and I will say to you again that the falsity of that testimony—any part of it alleged in this indictment—is alleged to be in that Shallas knew that Sievers was not at the Ethlyn Hotel in Spokane, Washington. during the afternoon and evening of October 14th, 1928, between three and five o'clock of that afternoon, or any other time on that day, and that Shallas did not see Sievers during the

afternoon of October 14, 1928, in said hotel, or elsewhere in Spokane, Washington. That is the charge of falsity made in this indictment. I say to you again that if you find—to find the defendant guilty it is not necessary that he knowingly testified falsely in all the respects charged, but it is sufficient if you find that he knowingly falsely testified in any one of the respects alleged, that is, either that Sievers was not at said hotel in Spokane, Washington, between three and five o'clock on the afternoon or evening of October 14, 1928. In other words, the falsity charged in this indictment is that Sievers was not at the hotel at between the hours of three and five on the afternoon of October 14, 1928, or the evening of October 14th, 1928."

(Assignments of Error 3, 4 and 5.)

ARGUMENT AND AUTHORITIES.

The motions for a directed verdict should have been granted on two grounds:

(1) Because under the indictment the Government was bound to prove that Sievers was not at the Ethlyn Hotel at all on October 14, 1928, and George Shallas did not see him at the Ethlyn Hotel or any other place in the City of Spokane during the afternoon of October 14, 1928, and the Government wholly failed in these respects.

(2) Because even under the Government's theory of the case, the evidence of Shallas' guilt rested solely on the uncorroborated testimony of Sievers.

(Specification of Error I.)

To clearly understand the question involved it is necessary to examine the indictment in this case closely. After the formal matters and the allegations of when and where Shallas was sworn, etc., the indictment says that he "did give the answers as hereinafter set forth in response to the questions hereinafter set forth, to-wit:" (Tr. 4). Then follows a series of questions and answers, many of which are obviously true, and then the indictment points out wherein the answers were false and wherein the defendant committed perjury in the following language:

> "Whereas, in truth and in fact, as he, the said George Shawle, alias George Shallas, then and there well knew, the said Theodore Seivers was not at the Ethlyn Hotel in the City of Spokane, State of Washington, during the afternoon and evening of October 14, 1928, during the time or times that the said George Shawle, alias George Shallas testified that the said Theodore Seivers was there, or at any other time on that day and that the said George Shawle, alias George Shallas, did not see the said Theodore Seivers during the afternoon of October 14, 1928, in the Ethlyn Hotel or any other place in the city of Spokane, State of Washington, whereby he, the said George Shawle, alias George Shallas did, then and there, as aforesaid, knowingly, wilfully, unlawfully, corruptly, falsely and feloniously swear and did feloniously commit perjury."

This alleges the truth that (1) Theodore Sievers was not at the Ethlyn Hotel in Spokane, Washington, at any time on October 14, 1928, and (2) that George Shallas did not see him at any place in Spo-

kane on October 14, 1928. That being the truth, according to the allegations of the indictment, then of course any testimony given by Shallas that Sievers was at the Ethlyn Hotel any time on October 14, 1928, or that he saw him at any place in Spokane on that date, was false.

An indictment for perjury must set up definitely wherein the defendant has testified falsely.

Hilliard v. U. S. 24 Fed. (2d), 99.

And it must also allege the truth in regard to the fact.

U. S. v. Pettus, 84 Fed. 791.
Bartlett v. U. S. 106 Fed. 884. (C. C. A. 9).

And it must follow that the Government having alleged what the truth is must be bound by its allegations. And while the rule is well established that the indictment may contain more than one specification of falsity and the Government is only bound to prove one, that is not the situation here.

The indictment might have been drawn to specifically traverse the truthfulness of each separate answer given by Shallas and the proof that one was false would have been sufficient, but that was not done. Instead the questions and answers were set out verbatim, followed by a general allegation of what the truth was upon which the defendant, the court and jury were to deduct which answers were false because in conflict with the truth as alleged. And the truth is alleged to be not merely that Siev-

ers was not in the Ethlyn Hotel at the specific times Shallas testified he saw him, but that he was not there then or at any other time on that day, which is equivalent to saying that he was not there at all on that day.

The Government having elected to place its charge of falsity on such broad grounds is bound by it.

The Government's contention, as we understood it at the trial, was that the phrase "or at any other time on that day" was merely an additional ground of falsity which the Government need not prove it if did not wish to. This construction we respectfully submit will not bear analysis. The allegation is not one taken by itself the proof of which would be sufficient to sustain a conviction. Suppose the Government had proved that Theodore Sievers was not in the Ethlyn Hotel "at any other time (that is, other than the times testified to by Shallas) on that day," they still would not have proved that Shallas in any way testified falsely.

The phrase can have but one meaning, but one purpose, namely, to charge that the defendant Shallas testified falsely when he testified that Sievers was in the Ethlyn Hotel on October 14th, because he knew the truth to be that Sievers wasn't in said Hotel at any time on said date. In practical effect the Government said to Shallas, by this indictment, it is immaterial whether Sievers was in the Ethlyn Hotel on October 14th at the exact hours you testi-

fied to, because he was not there at all on that date, as you, George Shallas, well knew.

In this connection we wish to call the Court's attention to a similar phrase in the last portion of this part of the indictment; in line 9, page 6 of the transcript, a coordinate clause commences with the conjunctive "and". This clause states the truth to be that "George Shallas did not see the said Theodore Sievers during the afternoon of October 14, 1928, in the Ethlyn Hotel, *or any other place in the City of Spokane, State of Washington.*"

The phrase in italics is used here in exactly the same way it is used in the preceding clause, except that it refers to place instead of time. It casts the same burden upon the Government, namely, to prove the truth to be that Shallas did not see Sievers at any place in Spokane on the afternoon of October 14, 1928. In other words, the Government concedes by this language that the material fact was whether Shallas saw Sievers in Spokane on the afternoon of October 14th, at any place, and not whether he saw him in the Ethlyn Hotel, or the Davenport Hotel. So in the preceding one, the Government concedes by the language of its indictment, that the material issue is, was Sievers at the Ethlyn Hotel on October 14, 1928, and not was he there exactly between 3:00 and 5:00 P. M., or 9:30 in the morning.

The purpose of the indictment is to inform the defendant of what he is charged and the issue he will have to meet, and we respectfully submit that

this indictment informed Shallas that the issue was that he testified falsely to having seen Sievers in Spokane on October 14th, because Sievers was not there at all on that date. There is no argument that if this contention is right the motion for a directed verdict should have been granted, because the Government's own testimony shows that Sievers was at the Ethlyn Hotel on the morning of October 14, 1928, and was in Spokane until 1:00 or 1:30 P. M. on that date.

The motions for a Directed verdict should have been granted because the evidence of the defendant's guilt rested on the uncorroborated testimony of Sievers.

The trial court refused to construe the indictment as contended for by the defendant, but submitted the case to the jury on the Government's theory, namely: that Shallas committed perjury when he testified that he saw Sievers in Spokane, Washington, at the Ethlyn Totel, on October 14, 1928, in the morning about nine o'clock and twice in the afternoon between three and five.

The testimony discloses that Sievers was at the Ethlyn Hotel and around the hotel in the morning of October 14th, and while he said he did not see Shallas, he also said "maybe he seen me." (Tr. 33). So that the sole issue was whether Shallas saw Sievers at the hotel in the afternoon of October 14th; Shallas says he did, Sievers says he did not, that he did not go back to the hotel.

Now the rule has been recently and definitely settled by the Supreme Court in Hammer v. U. S. 261, U. S. 620, 70 L. Ed. 1118, that the uncorroborated testimony of a witness in a perjury case is not sufficient evidence upon which to sustain a conviction. In that case the court said:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

Obviously, such corroboration must be corroboration of the material part of the witness' testimony. Of course a witness can testify to many immaterial and true occurrences and the Government can bring other witnesses to corroborate on these facts, but such corroboration is not within the meaning of the language of the Supreme Court, it does not extend to the facts in dispute.

With this principle in mind, let us examine the testimony in this case a little more closely.

Shallas was accused of having committed perjury in testifying he saw Sievers twice between three and five P. M. at the Ethlyn Hotel on October 14th. Sievers said he was in Spokane until about 1:30 P. M. on that date, but that he did not go back to the hotel after lunch, that he left Spokane about 1:30 and drove to Tensed a distance of about sixty miles, arriving there between 4:30 and 5:30 P. M., (Tr. 29), after having stopped on the way at Spangle. (Tr. 34).

The defendant does not dispute that Sievers was in Tensed in the late afternoon and evening of October 14th. He could have been there and arrived at the time he testified he did, between 4:30 and 5:30 P. M., and still have been seen by Shallas at the Ethlyn Hotel around three o'clock. The issue then further narrows itself down to the question what corroboration is there of Sievers when he says he left Spokane at 1:30 P. M. without returning to the Ethlyn Hotel. We respectfully submit an analysis of the record will disclose none whatever.

The Government, in an attempt to supply the needed corroboration, called a number of witnesses from Tensed, men who had all been present at a Sunday afternoon farewell dinner. Manifestly their testimony only went to prove that Sievers was back in Tensed on the afternoon of October 14th. They did not know or pretend to know what he did or whom he saw while in Spokane, or what time he left Spokane, save inferentially from their knowledge of when they saw him in Tensed. But Sievers himself has fixed that time for us between 4:30 and 5:30 P. M., a time not inconsistent with Shallas' statement. And, with one exception, the witnesses from Tensed do not place the arrival of Sievers in Tensed at a time which would make his necessary departure from Spokane prior to the time Shallas said he saw him. Mr. Shaw saw his car there between four and five o'clock. (Tr. 35 and 36). Mr. Weiss saw him there three or four times during the afternoon and gave no times at all. (Tr. 37 and

38). Mr. McNeil saw him some time after dinner, how long he doesn't know. (Tr. 41). Mr. Hart saw him in the afternoon and evening, but stated no hour at all. (Tr. 41 and 42).

The one exception was old Mr. Phillips, who after seven months remembered he saw them right around one o'clock. (Tr. 39). This is so palpably contradictory of Sievers' own testimony and the testimony of Mr. Mack and Miss Ohler, (Tr. 43 and 44), as to be plainly the honest mistake of an old man carried away with the excitement of the trial. Even the Government can make no contention that Sievers was back in Tensed at 1:00 P. M., without admitting that Sievers testimony is again as full of perjury, as he confessed it was in his first trial.

The other evidence upon which the Government relied for corroboration was the fact that Sievers testified that the hotel register of the Ethlyn Hotel was changed by Shallas to show that the Sieverses did not check out of the hotel on October 14th, and that there is apparently such a change on the register sheet. (Pl. Exhibit No. 3).

The fact in this regard are these: The register shows that Mrs. Sievers registered for room 36 at the Ethlyn Hotel on October 13th; that farther down on the sheet some one else has registered and been assigned room 36,—as the register now shows, on the 15th. Sievers' contention was that this second registration was originally for the 14th, and that Shallas erased the 4 and wrote in a 5.

Now the testimony in regard to what was done with the register sheet is this: Sievers says that after Shallas changed it he gave it to him, some two weeks after the liquor deal, that he had it in his possession for several hours and brought it up and gave it to Mr. Wernette, (Tr. 33), the lawyer who defended him in the first trial. Mr. Wernette kept it in his custody until the trial of the liquor case against Sievers, when it was introduced in evidence. Shallas identified it at that time as the register sheet of his hotel, but not one word was said to him or by him in regard to the second registration, nor any mention made of it in the liquor trial at all.

Conceding, for argument's sake, that if Shallas had retained the custody of his register and had brought it to the trial and offered it in evidence, that proof of the changes would have been sufficient corroboration of Sievers:—that is not the case here.

Here, several weeks before the trial, Sievers, the man who is sought to be corroborated, takes the register from Shallas, has it in his exclusive possession for several hours, gives it to his attorney, and Shallas never sees it again until he is permitted a cursory glance at it during Sievers' trial. Suppose Sievers makes whatever changes he desires on the register sheet, while he has possession of it, and then testifies someone else made the alterations, does the mere fact that the alterations are there corroborate him that someone else made them?

To hold so, is to sanction the too often tried logic

of the small boy who has broken the cellar window and in seeking to place the blame elsewhere proudly announces "Joe broke the window, and there's the broken window to prove it."

There are, of course, plenty of cases which hold that documentary evidence may take the place of another witness to furnish the necessary corroboration, but we know of none that hold such documents may be ones which the witness himself may have prepared.

Underhill's Criminal Evidence, 3d Edition, p. 917, sec. 682, states the rule as follows:

> "The written or oral admission of the accused, *or documentary evidence found in his possession or in the possession of those who may be criminally associated with him,* may be received as corroborative, and then if beleived by the jury, will be equivalent to another witness." (Italic ours.)

Here the documentary evidence was not found in defendant's possession, but was admittedly for a considerable time in sole possession of the witness Sievers.

The Supreme Court has also passed on this question, and in U. S. v. Woods, 14 Pet. (U. S.) 430, 10 L. Ed. 527, says:

> "In what cases, then, will the rule not apply? Or in what cases may a living witness to the *corpus delicti* of a defendant be dispensed with, and documentary or written testimony be

> relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it."

Here again it is at once apparent that the documentary evidence must spring from the accused and it can not be a document which the accusing witness had both the motive and the opportunity to prepare.

We respectfully submit therefore that the testimony of Sievers is wholly uncorroborated by any other witness or document and the motions should have been granted.

The Court erred in Instructing the Jury.

(Assignment of Error 2).

The same question is involved here as was argued in the first part of the argument on the motions for a directed verdict, namely: that the issue was whether or not Shallas saw Sievers in Spokane at all on October 14th, or not.

It is not necessary to repeat here the arguments already advanced that the issue involved was whether Shallas saw Sievers in Spokane at all on October 14th, and not merely whether he saw him between three and five P. M. That being the issue, it is our contention the court should have either granted the motion for a directed verdict or if he thought there was some doubt on that issue, should have submitted it to the jury with a proper instruction as requested; and that it was error to tell the jury that if they believe that Shallas did not see Sievers between three and five P. M. that they could find him guilty.

The appellee's motion to strike the Bill of Exceptions is without merit.

The appellee has had included in the transcript a motion to strike the bill of exceptions herein upon the grounds that it was not settled in time. The facts are that a motion for a new trial was presented on June 5, 1929, and orally argued before Judge Cavanah. The Judge was unable to decide the motion and took it under advisement and called for written briefs, which were submitted. On July 17, 1929, the Judge rendered a memorandum opinion and at the same time prepared and signed an order denying the petition for a new trial (Tr. 17.). Therafter the appellant applied for, and the Judge signed an order extending the time in which to serve, file and settle the bill of exceptions, and they were so settled within the time as allowed. The Government objects because they were not served

within the time as specified in Rule 76 of the District Court. However, the local rules are discretionary and not jurisdictional, and this court, in the case of Spokane Interstate Fair v. Fidelity & Deposit Company of Maryland, 15 Fed. (2nd) 48, held the trial court had the power to extend the time to present a bill of exceptions beyond that allowed by a general rule of court.

The further suggestion is made that the term of court had been adjourned on June 19, 1929, but at this time the court still had under advisement the petition for a new trial and the authorities are agreed that the time in which to serve the bill of exceptions does not begin to run until the motion for a new trial is passed upon.

Texas & Pac. Ry. vs. Murphy, 111 U. S. 488, 4 Sp. Ct. 497; 28 L. Ed. 492;

U. S. Ship B. E. F. Corp. v. Galveston Dry Dock Co., 13 Fed. (2d) 607.

The bill of exceptions was signed at the same term the motion for a new trial was overruled, and was therefore in time.

We respectfully submit, therefore, that the judgment herein was erroneous and should be reversed.

Respectfully submitted,

ROBERTSON & PAINE,
Attorneys for Appellant.

INDEX

CASES AND AUTHORITIES